

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

DR. VELTON C. WHITE and
DONNA WHITE,

Plaintiffs,

v.

Case No. 07-CV-892

MICHAEL C. MARSHALL,
SUPER SPRING ORTHODONTICS, LLC,
SPEEDALIGNERS, LLC,
NIGHTSHIFT LLC, and
DANIEL L. BISHOP

Defendants.

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MICHAEL MARSHALL'S
MOTION FOR RECONSIDERATION**

Mr. Marshall's request that the case be dismissed because his middle initial is "J" rather than "C" (as in the caption and complaint) is a specious and transparent attempt to avoid discovery. At least sixteen documents have been filed expressly on behalf of "Michael C. Marshall,"¹ beginning with the Notice of Appearance filed in December 2007:

Notice of Appearance: Dkt. No. 5, 12/11/07 (on behalf of Michael C. Marshall)

Declaration: Dkt. No. 7-2, 12/11/07 (Declaration of Michael C. Marshall)

Briefs: Dkt. No. 7, 12/11/07 (in opposition to motion for preliminary injunction)
Dkt. No. 15, 1/31/08 (in opposition to motion to strike transcript)
Dkt. No. 16, 1/31/08 (reply in response to plaintiff's surreply)
Dkt. No. 66, 10/21/09 (supporting motion to dismiss)
Dkt. No. 68, 10/21/09 (supporting motion to dismiss)

¹ Several other documents have been filed on behalf of "the defendants" without a specific reference within the document to Michael C. Marshall as a defendant.

Motions: Dkt. No. 9, 12/12/07 (motion to dismiss)
Dkt. No. 18, 4/10/08 (motion for summary judgment)
Dkt. No. 20, 4/10/08, (motion for joinder)
Dkt. No. 23, 4/28/08 (motion for leave to file amended sj motion)
Dkt. No. 63, 10/20/09 (motion for leave to file motion)
Dkt. No. 65, 10/21/09 (motion to dismiss)
Dkt. No. 67, 10/21/09 (motion to dismiss)
Dkt. No. 81, 2/2/10 (motion for reconsideration)

Joint Status Report: Dkt. No. 50, 4/24/09

Further, the answer and amended answer filed on February 19 and 27, 2009 (Dkt. Nos. 30 and 31) admitted that Michael C. Marshall: resides at 4629 52nd Ave., Kenosha, Wisconsin (¶ 3); is the registered agent of defendant Speedaligners (¶ 4); formed Super Spring Orthodontics, LLC (¶ 16); and manages both Speedaligners and Super Spring (¶ 34).

Also, as the Court noted in its December 23, 2009 Order (Dkt. No. 78, p. 3 n.2), defendants failed to file a certificate of interest as required by the local rules. (The docket shows a certificate of interest filed by defendants' counsel, Dkt. No. 6, but the corresponding document in fact pertains the plaintiff.) A proper certificate of interest would have presumably identified the full name of Michael J. Marshall as the party represented by attorney Marjory Stewart, and revealed the apparent discrepancy with the Michael C. Marshall identified in the complaint.

Rather than clarifying the issue, Mr. Marshall's recent filings have only created further ambiguity. In the "Response to Plaintiffs Amended Complaint" purportedly filed on behalf of defendant Nightshift LLC on December 3, 2009, the caption identifies Michael C. Marshall as a defendant, yet the document bears the handwritten signature of "Michael J. Marshall."² Two months later, on February 3, 2010, a motion for reconsideration was filed by "Michael C. Marshall, pro se," bearing the handwritten signature of "Michael Marshall." (Dkt. No. 81, pp. 2 and 3) Thus, Mr. Marshall (and his former counsel) has not only failed to previously bring the

² The Nightshift Response" is the subject of a pending motion to strike and for entry of a default (Dkt. No. 80) because Marshall is not an attorney and therefore cannot file any documents on behalf of Nightshift LLC.

supposed misnomer to the attention of plaintiffs' counsel, and failed to raise the issue with the Court in any of his prior motions, he has also affirmatively misled the Court and/or confused the issue by filing a declaration on behalf of Michael C. Marshall (Dkt. No. 7-2), and affixing his handwritten signature to a document as Michael C. Marshall. (Dkt. No. 81)

Further, Mr. Marshall does not claim in his present motion that he (Michael J. Marshall, assuming that to be true) is *not* the person whose activities are alleged in the pleadings. In other words, he does not dispute that he resides at 4629 52nd Ave., Apt. C, Kenosha, Wisconsin, that he had access to the allegedly infringed photographs, and that he manages the affairs of the three limited liability company defendants. In short, Mr. Marshall does not claim that he is the wrong guy, only that the pleadings got his middle initial wrong.

For Mr. Marshall to assert that the mistake concerning his middle initial requires dismissal of the claims against him and absolves him from responding to discovery is the height of chutzpah. The issue was never raised in more than two years of active litigation and motion practice, and as recently as February 3, 2010, he made the same mistake he accuses the plaintiffs of making, mistakenly referring to himself as Michael C. Marshall.

Aside from Mr. Marshall's complicity in allowing the alleged error concerning his middle initial to persist for two years, this Court has recognized that the misnomer of a defendant is not fatal to the complaint, and can be corrected at any stage of the litigation. In *Lewis v. Consumer First Properties*, 2009 WL 3515648 (E.D. Wis.), the defendant advanced the same argument as Mr. Marshall does here—contending that the fact that his name first and middle names were reversed in the complaint rendered the plaintiffs' claims ineffectual. The Court rejected the argument, explaining that a misnomer—misstating the defendant's name—is not fatal to a complaint.

CONCLUSION

For the reasons set forth above, the request for dismissal of the case should be denied. To the extent that the Court determines that the misnomer requires any relief from the Court, plaintiffs request that the Court deem the pleadings to be amended to reflect that the proper defendant is Michael J. Marshall.

Dated: March 5, 2010

/s/ John P. Fredrickson
John P. Fredrickson
Attorney for Plaintiffs Dr. Velton C. White and Donna White

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2010, I served the foregoing document by first class mail, postage prepaid, on the following parties that are currently unrepresented to the best of my knowledge:

Michael C. Marshall
4629 52nd Ave., Unit C
Kenosha, Wisconsin 53144

Speedaligners, LLC
4629 52nd Ave., Unit C
Kenosha, Wisconsin 53144

Super Spring Orthodontics, LLC
4629 52nd Ave., Unit C
Kenosha, Wisconsin 53144

Nightshift, LLC
4629 52nd Ave., Unit C
Kenosha, Wisconsin 53144

Daniel L. Bishop
17235 Two Mile Road
Franksville, WI 53126

/s/ John P. Fredrickson
John P. Fredrickson
Attorney for Plaintiffs Dr. Velton C. White and Donna White